Petition

81-1644

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NO.

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1981

FRANK DEAN,

Petitioner,

VS.

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI FROM FINAL JUDGMENT ENTERED BY THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

Frank Dean was indicted for violating three sections of the Federal Criminal Code, was tried before a jury in the United States District Court for the Eastern District of Arkansas, and was found guilty of all charges by that jury. It turned out that one of the members of that jury had made public statements before and during the trial which, in the District Court's view, "go beyond a simple expression of opinion. They evidence a settled disposition on the part of the juror to convict the Defendant regardless of the evidence." Based on its finding of "Clear bias" on the part of that juror, the District Court set that verdict aside, and ordered a new trial. Then, upon the Government's Motion, that Order was vacated upon a showing that the attorney for the Defendant was given information during the trial regarding that juror and his "Clear bias" which should have been but was not transmitted to the Trial Court. The jury verdict was reinstated. Upon timely appeal, a three-Judge panel of the Eighth Circuit Court of Appeals reversed the District Court and ordered a new trial, based on the misconduct of that juror. Upon petition for rehearing by the Government, the Eighth Circuit, sitting en banc, by a four-three vote, reversed the panel and reinstated the District Court's Order, thus affirming the conviction, on January 6, 1982.

This Petition has been filed to present this Court with the following question: Will the Supreme Court of the United States permit the Government to imprison a citizen upon the vote of a juror having "a settled disposition . . . to convict [that citizen] regardless of the evidence" presented at trial?

This Petition is also filed to present this Court with the question, admittedly raised here for the first time, of whether or not the District Court, by vacating the Order for a New Trial and reinstating the jury verdict, effectively denied Petitioner his Sixth Amendment right to a trial by jury and twice subjected Petitioner to jeopardy in violation of the Fifth Amendment to the United States Constitution.

PARTIES

The caption of the case in this Court contains the names of all parties.

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BRIEF FOR PETITIONER

Frank Dean, Petitioner herein, respectfully requests that this Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered on January 6, 1982. No motion for rehearing was filed.

REPORTS OF OPINIONS BELOW

(In chronological order)

On September 26, 1979, the United States District Court for the Eastern District of Arkansas, Jonesboro Division, entered its Opinion and Order granting Frank Dean's Motion for New Trial and vacating the jury verdict.

That Order and Opinion are reproduced herein as Appendix "E". To the best of the knowledge and belief of Petitioner, this Opinion was not published.

On October 11, 1979, and June 4, 1980, Orders of the District Court were entered granting the government's Motion for Reconsideration of the District Court's September 26, 1979 Order granting Defendant a new trial. These Orders are reproduced as Appendices "C" and "D". To the best of the knowledge and belief of Petitioner, these Orders were not published.

On April 17, 1981, a three-Judge panel of the United States Court of Appeals for the Eighth Circuit issued its Opinion reversing the Judgment of the District Court on the ground that the bias of the juror in question required a new trial. This Order is reproduced as Appendix "B". This case is reported as *United States v. Dean*, 647 F.2d 779 (8th Cir. 1981).

In an Opinion and Judgment entered January 6, 1982, on rehearing en banc, the Court of Appeals for the Eighth Circuit, by a four-three vote, reversed its panel and affirmed the Judgment of the District Court. No motion for rehearing was filed. To the best of the knowledge of Petitioner, this Opinion and Judgment have not been published. The Opinion is reproduced herein at Appendix "A".

JURISDICTIONAL STATEMENT

Title 28 U.S.C., Section 1254(1) states that cases in the Courts of Appeal may be reviewed by this Court:

> By Writ of Certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree. . . .

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment 6 to the Constitution of the United States, as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . .

Amendment 5 to the Constitution of the United States, as follows:

> . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . . .

STATEMENT OF THE CASE

Petitioner is a citizen of the United States and resident of the State of Arkansas who was indicted with violations of 18 U.S.C., Section 1962(c), 18 U.S.C., Section 1963, and 18 U.S.C., Section 1952 and Section 2. Petitioner was tried in the United States District Court for the Eastern District of Arkansas, Jonesboro Division, before a jury. The trial lasted two weeks, beginning Monday, July 9, 1979, and a verdict of guilty was rendered on Friday, July 20, 1979. Following that verdict, Petitioner moved for a new trial based on the misconduct of one of the jurors, a Lawrence

"Marty" Reynolds. At the hearing held by the District Cout on that motion, testimony was introduced on behalf of Petitioner as follows:

(1) Lloyd Bishop, a co-worker of Reynolds, testified that Reynolds, when summonsed as a juror, had said "Well, somebody is going to jail, but not me", that Reynolds, three or four days before the trial commenced, had said, "Well, I don't know if he's guilty or not, but we've got him up there and we're going to hang him", that Reynolds, on the first day of the trial said, "I don't know if he's guilty or not, but he's not going to get out", and that Reynolds, during the course of the trial, said "that he'd be glad when it was over with because he'd already established the fact that he was guilty".

(2) Benjamin "Jack" Hall, also a co-worker of Reynolds, testified that Reynolds said that "they was going to set an example out of Frank Dean", and that, during the second week of the trial, Reynolds told him that "they are going to hang Frank Dean and then they are going to get a bunch of them while they are at it".

(3) Marion Johnson, owner of a tavern frequented by Reynolds, testified that during the trial Reynolds stated to him, in response to the question "Do you think Frank Dean is guilty?", "Guilty as hell!"

(4) Joyce Taylor testified that three days before the trial was over she heard Reynolds say in public "that they are going to hang him [Frank Dean] and make an example of him and then they were going to get several others".

After hearing this testimony, the District Court ordered a new trial, finding a "settled disposition to convict regardless of the evidence" on the part of the juror Reyn-

olds which amounted to "Clear bias" in violation of Petitioner's Sixth Amendment rights.

Next, the government filed its Motion for Reconsideration of the Order Vacating the Verdict and Granting a New Trial, on the ground that the bias of juror Reynolds was known, or should have been known, to the Petitioner and his attorney, Mr. Fred M. Pickens, Jr., during the trial, that this knowledge was not brought to the attention of the trial Court during the trial, and that, therefore, Petitioner had waived his right to complain about it.

At the hearing on that Motion, a handwritten note containing the following language was introduced:

> There is a rumor that one of the jurors told a Mr. Johnson, at Johnson's Cafe, on 49 Highway, that Dean was "hung". This statement was made last week. The person that made this statement works at Dixons Garage and is serving on the jury.

Mr. Pickens, Petitioner's trial counsel, introduced the original of that note, and testified that it had been handed to him by a man he did not know at the entrance to the Federal Courthouse in Jonesboro as he and Frank Dean were entering the courthouse for the seventh or eighth day of the trial. Mr. Pickens stated that he did not read the note at that time, but put it in his pocket. He stated that he showed the note to Frank Dean that night, and asked Dean if he knew the name of the man who had given it to him. He stated that Dean replied that he was not sure. Mr. Pickens then testified that he put the note in one of the several briefcases he had with him and forgot about it, stating that rumors of that sort abound at every highly-publicized criminal trial. (Frank Dean was a former County

Judge, and was being tried for accepting bribes while in office, etc.)

Mr. Pickens further testified that on July 23, 1979, the Monday following the jury verdict on Friday, July 20th, he received an anonymous telephone call from a woman who told him that juror Lawrence Reynolds had, briefly put, publicly exhibited extreme bias and prejudice toward the Petitioner both before and during the trial. At this, Mr. Pickens testified that he recalled the note, and set in motion the investigation which led to the motion for a new trial.

At the conclusion of this hearing, the District Judge reinstated the jury verdict.

Jurisdiction of this case in the United States District Court was based on Title 18, U.S.C., Section 3231.

ARGUMENT

The government wants to incarcerate Petitioner regardless of the obvious juror misconduct for, apparently, two reasons: (1) Petitioner and his attorney should have revealed the contents of the note to the trial Court when it was received, but did not, and therefore cannot now be heard to complain of the actual bias of the juror, citing many cases supposedly supporting this proposition; and, (2) Petitioner is guilty anyway so it really doesn't make any difference that his conviction is based on the vote of a biased juror. In considering this petition, we ask this Court to take cognizance of the following, in response to those two arguments: (1) Neither the government nor the majority of the Eighth Circuit on rehearing cited a *single* decision supporting the first argument, *because there are none;* and, (2) The second argument is, in a word, outrageous.

The central, crucial point to this whole matter is that this case does not involve *potential* juror bias, but involves *actual* bias. In its Opinion and Order granting the Petitioner's Motion for a New Trial, the District Court stated the point most eloquently:

> A defendant is entitled to a fair and unbiased jury, and that means 12 fair and unbiased persons, not 11. If Mr. Reynolds had simply stated that he thought the defendant was guilty, a new trial would not have to be granted, because such a statement would not necessarily indicate a disposition on the juror's part to convict the defendant regardless of what evidence might be presented at the trial in the future. The statements made by the juror in this case go beyond a simple expres-

> sion of opinion. They evidence a settled disposition on the part of the juror to convict the defendant regardless of the evidence. The juror's perfunctory testimony that he did not make up his mind until the last day is insufficient to overcome the clear showing of bias. Bias of this kind in any trier of fact, judge or jury, is inconsistent with the Constitutional guarantee of a fair trial. "Clear . . . bias of a juror is . . . grounds for a new trial. . . ." [Citation omitted]

In this case, we have clear bias. We don't have any problem in proving the bias, a detail which seemed to trouble the majority of the Eighth Circuit, en banc, and we don't have any problem with the realization that Lawrence Reynolds did exactly what he had told many people he fully intended to do: In his words, "hang Frank Dean". And there can be no doubt that if this Court fails to grant this Petition, and ultimately reverse the Eighth Circuit, Frank Dean will go to jail having been convicted in as unfair a trial as is imaginable.

It is clear that the law provides that where a defendant or his attorney in a criminal case have good reason to suspect potential juror misconduct, and fail to report this information to the trial Court, that defendant cannot later complain of the potential misconduct. The government and the majority of the Eighth Circuit Court list myriad opinions illustrating that proposition. It is not at all clear — though it should be — whether when, as here, a juror is guilty of clear bias a defendant must still go to jail upon the vote of that juror, under the circumstances of this case. It should be clear, because the "orderly administration of justice" — the only reason for denying a new trial here —

should never be equated with a defendant's Sixth Amendment right to a fair trial, on a balancing of the two sometimes competing interests. Unless this Court grants this Petition, so as to permit a full exploration of this issue, the result will be crystal clear: Petitioner will be jailed upon the vote of Lawrence Reynolds, a result which, we submit, will make a complete mockery of the Sixth Amendment to the United States Constitution.

Petitioner feels that the question presented here is one which must be addressed by this Court, because of the lack of precedent in this Court, the Eighth Circuit, or anywhere else, as far as we can determine. And, most importantly, because of the obvious injustice involved.

When the District Court entered its Order vacating the jury verdict in this cause, the effective result of that Order was to expunge the conviction and to place Petitioner in the same position he had been in prior to the verdict: *i.e.*, clothed with all the rights and protections afforded all other criminal defendants in the United States, including the right to have his guilt or innocence determined by jury. When the District Court "reinstated" the jury verdict in its subsequent Orders, the District Court effectively denied Petitioner his right to trial by jury and twice subjected him to jeopardy. Petitioner feels that these issues should be addressed by this Court after full briefing and oral argument.

CONCLUSION

Petitioner respectfully requests that this Court issue a Writ of Certiorari to the Eighth Circuit, and after briefing and oral argument, reverse that Court's refusal to grant Petitioner a new trial.

Respectfully submitted,

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By: TIM F. WATSON

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I, Tim F. Watson, one of the attorneys for Petitioner, hereby state that I have at the time of mailing this Petition for Certiorari to the Supreme Court also served the Solicitor General, Department of Justice, Washington, D.C. 20530, and George W. Proctor, United States Attorney, U. S. Post Office and Courthouse, Little Rock, Arkansas 72203, with copies of said Petition. This Certificate of Service is made in compliance with Rule 33 of the United States Supreme Court Rules.

/s/ Tim F. Watson,
One of the Attorneys for
Petitioner

Appendix

APPENDICES

APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
ST. LOUIS, MISSOURI 63101

January 6, 1982

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Hon. George W. Proctor
United States Attorney
ATTN: Kenneth F. Stoll &
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327 U.S. Courthouse
Little Rock, Arkansas 72203

Mr. Frank Dean
609 Liberty St.
Marked Tree, Arkansas 72365

Re: 79-1919 United States v. Frank Dean

Dear Sirs:

Enclosed herewith for use of counsel is a printed copy of the opinion of this Court filed today in the above case. Judgment of this Court in accordance with the opinion is

also entered today. Please consult the Federal Rules of Appellate Procedure for appropriate post-opinion procedure.

Sincerely,

/s/ Robert D. St. Vrain
Clerk of Court

enc.
lk1
cc: Hon. Richard S. Arnold, U.S. Circuit Judge
Mr. Carl Brents, Clerk, U. S. District Court, P.O. Box 869, Little Rock, AR 72203 (J-CR-79-1 and J-CR-79-10)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 79-1919

UNITED STATES OF AMERICA,

Appellee,

v.

FRANK DEAN,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS

Submitted: September 15, 1981
Filed: January 6, 1982

Before LAY, Chief Judge, HEANEY, BRIGHT, ROSS, STEPHENSON, HENLEY and MCMILLIAN, Circuit Judges, en banc.

HENLEY, Circuit Judge.

This rehearing en banc follows the disposition by a panel of this court of an appeal from a judgment of the United States District Court for the Eastern District of Arkansas.[1] *See United States v. Dean*, No. 79-1919 (8th Cir.

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[1]The Honorable Richard S. Arnold, then United States District Judge for the Eastern District of Arkansas, presiding.

April 17, 1981). The district court had sentenced appellant Frank Dean to three years imprisonment and to a term of probation following his jury conviction on two counts of violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§1962(c) and 1963 and on thirty-six counts of violating the Travel Act, 18 U.S.C. §1952.

The panel majority held (1) that appellant's conviction on two RICO counts did not violate the double jeopardy clause of the Fifth Amendment of the Constitution, (2) that the district judge did not err in admitting into evidence certain income tax returns of a business conducted by appellant, (3) that the jury could properly find that the office of County Judge was an "enterprise" as defined by the relevant RICO provision, 18 U.S.C. §1961(4), and (4) that the appellant, by failing to object to a given jury instruction concerning the definition of the term "pattern of racketeering activity" could not prevail on that issue on appeal.

The panel majority nevertheless reversed the judgment of the district court, and remanded the case for a new trial, because it found that one of the members of the jury was in fact biased against the appellant, to such an extent that he did not in fact decide the case on the basis of an impartial consideration of the evidence. The majority held that where actual bias of the type described has been shown, and where the defendant had knowledge of this bias prior to the jury's rendition of its verdict, but did not bring this knowledge to the attention of the trial judge until after the verdict had been rendered, the defendant had nevertheless not waived his right to a new trial by reason of such bias.

It is this issue only with which we are here concerned.[2]

For reasons to be stated, we conclude that the appellant, by not bringing his knowledge of possible juror bias to the attention of the district court judge prior to the jury's rendition of its verdict, waived his right to a new trial based on such juror bias. Accordingly, we affirm the judgment of the district court.

Dean's jury trial began July 9, 1979 and ended with the jury's rendition of its verdict on Friday, July 20, 1979, finding the defendant guilty on all counts. On July 25, the attorney for the defendant, Mr. Pickens, filed a motion for extension of time within which to file a motion for new trial. This motion was granted, a motion for new trial was subsequently filed, and a hearing on the motion was held on September 20, 1979. The evidence adduced at the hearing showed that one of the jurors had, during the course of the trial, made statements out of court to the effect that the defendant was guilty and should and would be convicted.

The district judge granted the motion for new trial, stating:

> The statements made by the juror in this case go beyond a simple expression of opinion. They evidence a settled disposition on the part of the juror to convict the defendant regardless of the evidence. The juror's perfunctory testimony that

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[2]It has been suggested that the district judge, by vacating the order for a new trial and reinstating the jury verdict, may have effectively twice subjected the defendant to jeopardy in violation of the Fifth Amendment. This issue, however, was neither raised nor argued by the appellant at trial, and it was not otherwise preserved for review here. We therefore leave this issue for a more appropriate day.

> he did not make up his mind until the last day is insufficient to overcome the clear showing of bias.

Investigations conducted subsequent to the order granting the new trial, however, disclosed that on or about July 17, 1979, while the trial was continuing, a note was handed to Mr. Pickens by a man who was unknown to him. The note stated:

> There is a rumor that one of the Jurors told a Mr. Johnson, at Johnson's Cafe, on 49 Highway, that Dean was "hung." This statement was made last week. The person that made this statement works at Dixon's Garage and is serving on the jury.

The government thereupon filed a motion for reconsideration of the September 26 order. A hearing on this motion was held on October 10, 1979. Although the record of that hearing is incomplete,[3] the evidence adduced at the hearing indicates that Mr. Pickens had in fact received the above quoted note during the course of the trial, and that the defendant was with him at the time of receipt of the note. The note was shown to the defendant by Mr. Pickens, and Mr. Pickens asked the defendant who had supplied the note. The defendant knew the informant as a result of various business dealings, but could not at this time recall the informant's name.[4] He told his attorney that he would

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[3]The transcript of the October 10 proceeding has been lost. The parties could not agree on a statement of the proceeding, and the district court on May 8, 1980 issued an order providing a transcription of the court's own notes of the October 10 proceeding as a part of the record on appeal. See Fed. R. App. P. 10(c).

[4]The defendant testified that he knew the man vaguely, that the informant was a member of the Quorum Court of Craighead County, and that they had had business conversations on the telephone while defendant was the County Judge of Poinsett County. The defendant also testified that he had not met the informant personally.

find out who the informant was, but apparently took no further action on the matter between that time and the time that the jury rendered its verdict.

Mr. Pickens testified that he had received an anonymous telephone call on the Monday following the trial, and had been informed thereby that one of the jurors had been making improper statements during the course of the trial. Mr. Pickens also testified that it was this telephone call, and not the note, which had prompted him to investigate these allegations and to consider a motion for new trial. He testified that he had not relied on the note because he considered it to be merely a rumor.

The district judge found as a fact that the note had been handed to Mr. Pickens, that both defendant and Mr. Pickens knew about this allegation, that neither of them had brought it to the attention of the court or sought any relief, and that there were two alternates on duty at all times. The district judge also found that the note, although it did not mention the juror's name, was sufficient to put the defendant on notice as to the identity of the juror. The district judge therefore vacated his order for a new trial and set the case for sentencing.

We observe initially that Mr. Pickens was handed the note as he was nearing the end of a rather lengthy and difficult trial. We also note that during the course of the trial Mr. Pickens was working out of a hotel room and presumably did not have the benefit of an assistant. And, we observe that the defendant appears to have failed to supply his attorney with the name of the informant. In these circumstances, it is perhaps understandable that Mr. Pickens and his client elected not to undertake what later

proved to be a time consuming investigation of the allegations contained in the note.

But we also observe that the identity of the juror in question could have been easily ascertained from the content of the note and from a perusal of the jury list, and that defendant and his attorney at least could have raised the issue of juror bias by bringing the note promptly to the attention of the trial court if they had cared to do so. The trial judge then could have taken appropriate action such as granting a short continuance for further investigation, excusing the juror and seating an alternate, or granting a mistrial. In these circumstances, we are not prepared to overturn the district court's holding that the note should have been brought to the court's attention before the jury retired to consider its verdict.

There remains the issue whether, assuming actual juror bias has been shown, the defendant's failure to bring the note to the court's attention can be held to be a waiver of alleged error.

The panel majority observed that there is a paucity of cases in the federal courts which have dealt with proven juror bias. It was assumed by the panel that this paucity resulted from the district courts' prompt orders for new trials in those cases where actual juror bias had been shown. We think it equally likely, however, that this paucity results from the fact that "actual" juror bias is difficult, if not impossible, to prove.

This difficulty in proving juror bias would appear to be, at least in part, the result of a tendency on the part of jurors not to admit that they are in fact prejudiced. "It would be remarkable if [a] juror admitted that he had

been influenced because he would thereby admit that he violated his oath. . . ." *United States v. Brumbaugh*, 471 F. 2d 1128, 1131 (6th Cir.) (McCree, J., concurring), *cert. denied*, 412 U.S. 918 (1973).

One example of this tendency is found in *Parker v. Gladdin*, 385 U.S. 363 (1966). In *Parker*, a bailiff stated to one of the jurors, in the presence of others, " 'Oh, that wicked fellow . . . , he is guilty'; and on another occasion said to another juror . . . , 'If there is anything wrong [in finding petitioner guilty] the Supreme Court will correct it.' " *Id* at 363-64 (footnote omitted). The Supreme Court held that the petitioner had been denied a fair trial despite the testimony of ten of the jurors that they had not overheard the remark, and despite the fact that Oregon law permitted a verdict of guilty by ten affirmative votes. The Supreme Court instead found that the statements of the bailiff reached at least three of the jurors, and also that "the unauthorized conduct of the bailiff 'involves such a probability that prejudice will result that it is deemed inherently lacking in due process'. . . . '[I]t would be blinking reality not to recognize the extreme prejudice inherent' in such statements." *Id.* at 365 (citations omitted).

Similarly, in *Marshall v. United States*, 360 U.S. 310 (1959), it had come to the attention of the trial court that seven jurors had been seen reading newspapers containing articles that had mentioned certain evidence which had been held inadmissible at trial. The trial judge examined each of these jurors individually, and found that each of them had read at least one of the articles. Each of these jurors, however, testified that he would not be influenced by the articles, that he could decide the case only on the evidence in the record, and that he felt no prejudice against

the petitioner as a result of reading the articles. The Supreme Court, apparently not believing this testimony, ordered a new trial.

> We have here the exposure of jurors to information of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence. The prejudice to the defendant is almost certain to be as great when that evidence reaches the jury through news accounts as when it is a part of the prosecution's evidence.

Id. at 312-13.

We conclude that, generally speaking, post-verdict orders for new trials on account of suspected but unproven juror bias are, and should be, granted only where the probability for juror bias is so great that in fairness it cannot be ignored. Thus, we are inclined not to make a distinction between possible prejudice and actual prejudice when addressing the issue of waiver. *See Brumbaugh, supra,* 471 F.2d at 1130-31 (McCree, J., concurring).

We also observe that in those cases studied which have dealt with the timeliness of an objection to juror misconduct during trial, a finding of untimeliness has not been dependent on a consideration of the degree of prejudice resulting from the alleged misconduct. *See United States v. Sorenson,* 611 F.2d 701, 702 (8th Cir. 1979): *United States v. Jones,* 597 F.2d 485, 488-89 (5th Cir. 1979), *cert. denied,* 444 U.S. 1043 (1980); *United States v. Nance,* 502 F.2d 615, 621 (8th Cir. 1974), *cert. denied,* 420 U.S. 926 (1975); *United States v. Hester,* 489 F.2d 48, 50 (8th Cir. 1973); *Oakes v. Howard,* 473 F.2d 672, 674 (6th Cir.), *cert. denied,* 412 U.S. 952 (1973); *United States v. Brumbaugh,* 471 F.2d at 1130; *United States v. Carter,* 433 F.2d 874, 876 (10th Cir. 1970);

Hall v. United States, 396 F.2d 428, 429 (10th Cir.), *cert. denied*, 393 U.S. 986 (1968); *United States v. Coduto*, 284 F.2d 464, 468 (7th Cir. 1960), *cert. denied*, 365 U.S. 881 (1961); *Zachary v. United States*, 275 F.2d 793, 796-97 (6th Cir.), *cert. denied*, 364 U.S. 816 (1960); *United States v. Kansas City, Mo.*, 157 F.2d 459, 461 (8th Cir. 1946); *Langer v. United States*, 76 F.2d 817, 827-28 (8th Cir. 1935); *Pratt v. Commonwealth*, 136 S.W.2d 1057, 1057-58 (Ky. App. 1940); *State v. Turley*, 452 S.W.2d 65, 68-69 (Mo. 1965); *State v. Reeder*, 394 S.W.2d 355, 357-58 (Mo. 1965); *State v. McGee*, 83 S.W.2d 98, 104-05 (Mo. 1935); *State v. Blair*, 280 S.W.2d 687, 689 (Mo. App. 1955); *Rippee v. State*, 384 S.W.2d 717, 718 (Tex. Crim. App. 1964).[5] *See also* Annot., 96 A.L.R. 530

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[5]**United States v. Rattenni**, 480 F.2d 195 (2d Cir. 1973), is not helpful to the appellant. In **Rattenni**, a verdict had been returned against the defendant on a conspiracy charge, but the jury announced that it was deadlocked as to all other charges against the defendant. On the following morning, before deliberation on the remaining charges was resumed, one of the jurors announced that she had heard a prejudicial radio broadcast that morning. It was not until after this announcement that defense counsel learned that other prejudicial news had reached the jurors **before** they had returned their previous verdict of guilty on the conspiracy count. **Id.** at 196-97. The appeals court reversed the trial court's refusal to set aside the verdict on the conspiracy count, stating:

> (We cannot) . . . permit the judgment to stand because of the alleged dereliction of Rattenni's counsel. He stated without contradiction that he did not know about any of the publicity until the forelady and the jurors revealed it.

Id. at 197.

Similarly, neither **Gomez v. United States**, 245 F.2d 344 (5th Cir.), **cert. denied**, 355 U.S. 863 (1957), nor **Ford v. United States**, 201 F.2d 300 (5th Cir. 1953), presents a fractional situation similar to the one being considered here. The court in **Ford** stated:

> Where the objection to a juror relates, not to actual prejudice or other fundamental incompetence, but to a statutory disqualification only, such disqualification is ordinarily waived by a failure to assert it until after verdict, **even though the facts which constitute the disqualification were not previously known to the defendants.**

Id. at 301 (emphasis supplied), **cited in Gomez, supra**, 245 F.2d at 346.

(1935). This Annotation states:

> The general rule is that misconduct on the part of anyone in connection with the jury after their retirement, although it be of a character which might vitiate the verdict if brought to the attention of the court by timely complaint, is not available after the return of the verdict, as a ground for a new trial or reversal, where it was known to the defendant or his counsel before the return of the verdict.

Id. But see United States v. Fries, 9 F. Cas. 826, 916-23 (C.C.D. Pa. 1799) (No. 5126).

The cases generally have dealt with the timeliness issue as in *United States v. Sorenson,* where this court, without considering the degree of prejudice that might have been present, held that an objection based on known jury misconduct could not be raised for the first time after trial. 611 F.2d at 702. In *United States v. Nance, supra,* the misconduct alleged was the jurors' collective failure to observe the court's admonition not to discuss the case during the pendency of the trial. This court refused to remand the case on the ground of juror misconduct because the evidence showed that defense counsel knew about the misconduct prior to the jury's rendition of the verdict, and did not bring it to the court's attention until after the verdict was rendered. " 'A party may not stand idly by, watching the proceedings and allowing the court to commit error of which he subsequently complains.' " 502 F.2d at 621, *quoting McNeely v. United States,* 353 F.2d 913, 917 (8th Cir. 1965). This court then cited lack of prejudice as an additional reason for our decision. There is no indication, however, that lack of timeliness, standing alone, was not a

sufficient ground for our refusal to remand for a new trial on the issue of juror misconduct.[6]

In sum, we decline to make a distinction between possible prejudice and actual prejudice when addressing the issue of waiver. We conclude that our line of decisions, culminating in *United States v. Sorenson*, 611 F.2d 701, 702 (8th Cir. 1979), is controlling, and that appellant, by not bringing the question of juror misconduct to the attention of the trial court before the verdict was returned, thereby waived his right to a new trial.

The judgment of the district court is affirmed.

McMILLIAN, Circuit Judge, dissenting, with whom LAY, Chief Judge, and HEANEY, Circuit Judge, join.

I must respectfully dissent for the reasons discussed in my opinion for the panel majority, *United States v. Dean*, 647 F.2d 779, 782-85 (8th Cir. 1981). I would reverse and remand for a new trial.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

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[6]In **United States v. Jones, supra,** a case involving an alleged attempt to bribe a juror, the Fifth Circuit treated the motion for new trial as one based on newly discovered evidence. However, the **Jones** court found that the defendant had not met his burden of showing due diligence and lack of knowledge, and decided the issue without considering the materiality of the newly discovered evidence or the probability that a new trial would result in acquittal. 597 F.2d at 448-89.

APPENDIX "B"

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 79-1919

UNITED STATES OF AMERICA,

Appellee,

v.

FRANK DEAN,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS

Submitted: October 15, 1980
Filed: April 17, 1981

Before LAY, Chief Judge, BRIGHT *and* MCMILLIAN, Circuit Judges.

MCMILLIAN, Circuit Judge.

Appellant Frank Dean appeals from a judgment of the District Court for the Eastern District of Arkansas sentencing him to three years imprisonment and a term of probation, after appellant was convicted by a jury of two counts of violating the Racketeer Influenced and Corrupt Organizations Act (hereinafter RICO), 18 U.S.C. §§1962

(c), 1963, and with thirty-six counts of violating the Travel Act, 18 U.S.C. §§1952, 2. After the jury verdict, appellant brought to the attention of the court evidence that one of the jurors had not been impartial. The district court ordered a new trial. *United States v. Dean,* Nos. J-CR-79-1 and J-CR-79-10 (E.D. Ark. Sept. 26, 1979) (*Dean I*). Subsequently, however, the government obtained evidence that during the trial appellant had heard of rumors that the juror was not impartial. The district court, finding that appellant in the exercise of due diligence should have brought the matter to the attention of the court before the jury retired, vacated its order for a new trial and reinstated the verdict. *United States v. Dean,* Nos. J-CR-79-1 and J-CR-79-10 (E.D. Ark. Oct. 11, 1979).[1] Sentence was then imposed. Appellant contends that the conviction violated his right to trial by an impartial jury.[2] We reverse and remand for a new trial.

This prosecution arose out of bribes allegedly received by appellant in violation of Arkansas law during the years

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[1]The court ordered a new trial on Sept. 26, 1979 (**Dean I**); the hearing on the government's motion to vacate the new trial order took place on Oct. 10, 1979. The court on Oct. 11, 1979, issued an order vacating the new trial order; the Oct. 11 order was issued without opinion, and referred to the Oct. 10 proceeding. Subsequently, the transcript of the Oct. 10 proceeding was lost. The parties could not agree on a statement of the proceeding, and the district court on May 8, 1980, isued an order providing a transcription of the court's own notes of the Oct. 10 proceeding as part of the record on appeal in this case. **United States v. Dean,** Nos. J-CR-79-1 and J-CR-7910 (E.D. Ark. May 8, 1980) (**Dean II**). **See** Fed. R. App. P. 10(c).

[2]Appellant also contends that the indictments failed to charge an offense under RICO, that conviction on both RICO counts would violate double jeopardy, and that the district court committed various errors in the conduct of the trial and admission of evidence. We address the contentions as to the indictment in deciding whether to remand the RICO counts, but we do not decide the remainder of the issues, although in the interests of judicial economy we discuss briefly a few questions that are likely to arise on remand.

1971 through 1978,[3] while he was county judge of Poinsett County, Arkansas. (The office of county judge held by appellant was not judicial but rather an executive position similar to that of a county supervisor or manager.) The alleged bribery, which was part of appellant's dealings through the mail with out-of-state vendors, involved both the taking of "kickbacks" on supplies actually delivered to the county and the filing of "bogus invoices" for supplies never delivered, and allegedly cost the county more than $150,000. A grand jury returned two indictments against appellant. One indictment, No. J-CR-79-1, involved appellant's transactions with Paul A. Baldwin, doing business as the Lisco Company. It charged appellant with twenty-nine counts of violating the Travel Act, 18 U.S.C. §1952,[4] by involvement in use of interstate commerce (the mails) for

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[3]During the period in question Arkansas revised its criminal code and in doing so broadened its bribery statute. See ARK. STAT. ANN. §41-2703 comment (1977). Before enactment of the criminal code the relevant statute was former ARK. STAT. ANN. §41-901 (repealed Jan. 1, 1976); in the new code the relevant statute is ARK. STAT. ANN. §41-2703 (1977). Although violations of two technically different Arkansas statutes were alleged in the indictment depending on the date of the alleged specific act of bribery, we consider all the charges to involve the single Arkansas offense of acceptance of bribes by a public officer.

[4]The Travel Act provides in relevant part:

> (a) Whoever travels in interstate . . . commerce or uses any facility in interstate . . . commerce . . . with intent to—
>
> . . .
>
> (3) . . . carry on . . . any unlawful activity,
>
> . . . shall be fined not more than $10,000 or imprisoned for not more than five years, or both.
>
> (b) As used in this section, "unlawful activity" means . . . bribery . . . in violation of the laws of the State in which committed. . . .

18 U.S.C. §1952.

an unlawful activity (bribery), and one count of violation of RICO, 18 U.S.C. §§1962(c) and 1963.[5] RICO makes it a federal crime to conduct the affairs of an enterprise[6] affecting commerce (here the county judge's office) through a pattern of racketeering activity[7] (here the alleged bribery[8] and Travel Act violations). The other indictment, No. J-CR-79-10, involved appellant's transactions with Irvin R. Pratt, who represented both Prattco

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[5]RICO provides in relevant part:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in . . . interstate . . . commerce, to conduct or participate in . . . such enterprise's affairs through a pattern of racketeering activity. . . .

18 U.S.C. §1962(c).

> Whoever violates any provision of section 1962 of this chapter (18 U.S.C. §1962) shall be fined not more than $25,000 or imprisoned not more than twenty years, or both. . . .

18 U.S.C. §1963.

[6]The statute provides:

> "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.

18 U.S.C. §1961(4).

[7]The statute provides in relevant part:

> "(r)acketeering activity" means (A) any act . . . involving . . . bribery . . . , which is chargeable under State law and punishable by imprisonment for more than one year . . . ,

18 U.S.C. §1961(1).

> "pattern of racketeering activity" requires at least two acts of racketeering activity, . . .

18 U.S.C. §1961(5).

[8]The bribery was allegedly in violation of ARK. STAT. ANN. §41-2703 (1977) and former ARK. STAT. ANN. §41-901 (repealed Jan. 1, 1976), both of which were punishable by imprisonment for more than one year.

Products Company, Inc., and Bi-Search Industries. It charged seven Travel Act violations based on alleged bribes and one count of RICO based on conduct of the county judge's office through the alleged bribes from Pratt as a pattern of racketeering activity. (Pratt and Baldwin both testified against appellant after they were granted immunity from prosecution.)

Biased Juror

The district court found that one of the jurors who reached the verdict convicting appellant had "a settled disposition . . . to convict [appellant] regardless of the evidence." *Dean I, supra,* slip op. at 6. This finding is not challenged on appeal, and there was evidence that the juror in question had made numerous statements demonstrating bias, for example, proclaiming on the first day of trial, "Well, I don't know whether he's guilty or not, but he's not going to get out." *Id.*, slip op. at 1.

Appellant first brought the misconduct to the attention of the district court after his conviction, and the court ordered a new trial. "Bias of this kind in any trier of fact, judge or jury, is inconsistent with the constitutional guarantee of a fair trial. 'Clear . . . bias of a juror is . . . ground for a new trial. . . . ," *Dean I, supra,* slip op. at 3, *citing* 6A MOORE, FEDERAL PRACTICE ¶ 59.08(4), at 59-124 (2d ed. 1979).

The government then investigated the matter further and learned that an anonymous note had been given to defendant's attorney during the trial. The note related "rumors" that the juror in question had expressed a biased view of the case to a third party. On the government's

motion for reconsideration of the new trial motion, the district court found that appellant's attorney had received the note during the trial and had shown the note to appellant. *Dean II, supra,* slip op. app. at 4-5. The district court also found that appellant's attorney "in the exercise of reasonable diligence, should have brought the allegation of misconduct on the part of this juror to the [c]ourt's attention," *id.*, slip op. app. at 5, at the time the allegation became known to him.[9] Accordingly, concluded the court, principles of equity would preclude appellant from raising the juror's bias as grounds for a new trial. *Id.* In a later proceeding the court expressed the view that in light of the information received by appellant and counsel during the trial, appellant received a fair trial under the totality of the circumstances.[10]

Although we recognize the importance of the factors leading the district court to vacate its order for a new trial, we think that in the extraordinary circumstances of this case the order for a new trial must be reinstated as an exercise of our supervisory power over the administration of justice in this circuit. Even a serious potential for juror bias has caused the Supreme Court to order a new trial as a matter of the administration of justice. *Marshall v. United*

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[9]Appellant neither brought the matter to the attention of the court when he first heard the rumors, nor told the court of the rumors at the hearing on his motion for a new trial. The district court focussed on the earlier omission in vacating its order for a new trial. We observe that the later omission, while not directly relevant to the merits of the new trial motion, was not explained by appellant's attorney and appears to us an inexcusable failure to provide the court relevant evidence in appellant's possession, a failure that we condemn in the strongest terms.

[10]On July 1, 1980, the district court held a hearing on appellant's motion to amend the court's statement in **Dean II** of the proceeding in which the court reinstated the verdict. **See note 1 supra.**

States, 360 U.S. 310 (1959) (per curiam) (exposure of jurors to prejudicial publicity). In this case we are confronted with actual, not potential, juror bias. We cannot permit actual, proven bias which prevents a juror from impartially deciding the case, without doing incalculable harm to the jury system as an institution. "The truth pronounced by Justinian more than a thousand years ago that, 'Impartiality is the life of justice,' is just as valid today as it was then." *United States v. Brown*, 539 F.2d 467, 469 (5th Cir. 1976). *See also Groppi v. Wisconsin*, 400 U.S. 505 (1971). The actual bias in this case goes to the heart of the integrity of the judicial proceeding.

We have no disagreement whatsoever with the district court's view that the failure of appellant's attorney to bring the matter earlier to the court's attention resulted from an unjustified lack of diligence. But the remedy cannot be to overlook the fact that this trial did not occur before an impartial jury. The way to address counsel's unjustified delay in raising the question of juror bias is to proceed against counsel in an appropriate forum.[11]

Our belief that considerations of judicial administration are paramount in this case is reinforced by the paucity of reported cases on actual juror partiality in the federal court system. This lack of precedent in the appellate courts reflects the high value traditionally placed upon preserving the integrity of the trial process consistent with the unqualified sixth amendment guarantee of an impartial jury. The vast majority of cases where a juror was actually biased against the defendant have surely been resolved by an order for a new trial, which cannot ordinarily be ap-

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[11]**See also note 9 supra.**

pealed. The government cites decisions of appellate courts upholding denial of a new trial in cases of juror misconduct with a potential for affecting impartiality, but not cases in which a juror was actually biased. *See United States v. Sorenson,* 611 F.2d 701 (8th Cir. 1979) (per curiam) (allegations that juror slept during part of the trial); *United States v. Nance,* 502 F.2d 615 (8th Cir. 1974), *cert. denied,* 420 U.S. 926 (1975) (allegations that jurors discussed case during trial); *United States v. Hester,* 489 F.2d 48 (8th Cir. 1973) (per curiam) (sleeping juror); *Wangrow v. United States,* 399 F.2d 106 (8th Cir.), *cert. denied,* 393 U.S. 933 (1968) (juror seen reading newspaper during trial); *United States v. Kansas City,* 157 F.2d 459 (8th Cir. 1946) (improper jury view of property involved in civil case); *Langer v. United States,* 76 F.2d 817 (8th Cir. 1935) (jurors reading newspapers during trial); *see also United States v. Brumbaugh,* 471 F.2d 1128, 1130-31 (6th Cir.) (McCree, J., concurring), *cert. denied* 412 U.S. 918 (1973) (improper remarks to jury by bailiff); *United States v. Carter,* 433 F.2d 874 (10th Cir. 1970) (sleeping juror); *Mares v. United States,* 383 F.2d 805 (10th Cir. 1967) (pretrial publicity); *United States v. Coduto,* 284 F.2d 464 (7th Cir. 1960), *cert. denied,* 365 U.S. 881 (1961) (*simil*). *See generally* 5 L. ORFIELD, CRIMINAL PROCEDURE UNDER THE FEDERAL RULES §33.10 (1967); Orfield, *Trial Jurors in Federal Criminal Cases,* 29 F.R.D. 43 (1963). *Cf. Remmer v. United States,* 347 U.S. 227 (1954), *after remand,* 350 U.S. 377 (1956) (jury tampering efforts are always presumptively prejudicial).

We have found two precedents in the federal system that reinforce the conclusion that a new trial is required in

this case.[12] In *United States v. Rattenni*, 480 F.2d 195 (2d Cir. 1973), the court found that a juror, influenced by adverse publicity about Rattenni during the trial, was in fact no longer able to view the case impartially. Holding such a finding grounds for overturning Rattenni's conviction, Justice Clark (sitting by designation) explained:

> Nor can we, as the Government requests, permit the judgment to stand because of the alleged dereliction of Rattenni's counsel. He stated without contradiction that he did not know about any of the publicity until the . . . jurors revealed it. However, he had been told afterwards in the courtroom corridor that 'for the last two days' the [local] media had 'been talking about Mr. Rattenni's prior convictions and indictments. . . .' Counsel's concern over the effect of [a newspaper] article was characterized as 'a little late.' The trial judge found: 'We duly recorded a proper verdict . . . the jury was polled. There was no taint whatsoever on the verdict and I am not going to have any proceeding now in a backhanded way designated to impeach that verdict in this manner. This is not the way to do it.'

Id. at 197. Thus, "the crucial importance of protecting the integrity of the trial process," *id.* at 198, controlled the outcome, despite the possibility that the defendant's counsel had failed [illegible] the issue to the court's attention at the [illegible]ent.

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[12]There is also dicta in **Gomez v. United States**, 245 F.2d 344, 346 (5th Cir.), **cert. denied**, 355 U.S. 863 (1957), and **Ford v. United States**, 201 F.2d 300, 301 (5th Cir. 1953), to the effect that cases of actual prejudice are an exception from the doctrine that failure to assert an objection to a juror until after the verdict waives the objection.

The only other case we have found involving similar problems of juror bias not raised until after the verdict is an old one, *United States v. Fries,* 9 F. Cas. 826 (C.C.D. Pa. 1799) (No. 5126), a treason case arising out of Fries' part in organized resistance to measures of the administration of John Adams, including the Allen and Sedition Acts. After Fries' first treason trial resulted in a conviction, the court ordered a new trial on a finding that one of the jurors had been prejudiced. *Id.* at 921-23. The juror had revealed prejudice by saying that the defendant "ought to be hung." *Id.* at 918. The verdict convicting Fries had been reached May 9, 1799, yet counsel did not raise the issue of juror bias to the court until May 14, despite counsel's admission on May 14 that "the other day, in coming into court, he received a slight information, which he thought it his duty, as advocate for the prisoner, to make further inquiries into; but it was not till this morning that he had been able to procure the depositions of witnesses to prove a fact. . . ." *Id.* at 916. Thus, like counsel in the present case, Fries' counsel had information prior to the verdict which he did not bring to the attention of the court until after the verdict.[13] As to any question of waiver, the court appeared to adopt a standard of actual knowledge of the misconduct. Judge Iredell concluded, "there is . . . cause, if it is proved that the juror was biased, to order [a new trial], after the verdict is pronounced, whatever delay or inconvenience may result therefrom; for that can be no reason to withhold a privilege to which a prisoner is entitled." *Id.* at 922.

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[13]**Cf. United States v. Shahane,** 517 F.2d 1173 (8th Cir.), **cert. denied,** 423 U.S. 893 (1975) (where defendant brought a rumor of potential juror bias to the attention of the court during trial, the trial court decided to allow the trial to proceed and suggested the defendant could raise the issue after the verdict if it was unfavorable.)

In conclusion, we hold that appellant is entitled to a new trial in the circumstances of the present case. We emphasize that the district judge found the juror so biased against appellant that the juror did not in fact decide the case on the basis of an impartial consideration of the evidence. Our holding should in no way be taken as embodying an arbitrary rule that all expressions of bias, for example, against criminals in general, would be grounds for a finding that a juror was not impartial. *See United States v. Hendrix*, 549 F.2d 1225 (9th Cir.), *cert. denied*, 434 U.S. 818 (1977). *Cf. United States v. Shahane, supra,* 517 F.2d 1173 (no abuse of discretion by district court in finding juror impartial despite juror's expressions of bias against drug users and of disapproval of appearance of defendant's counsel). We do not in any way condone the conduct of appellant's counsel in failing to raise the issue earlier or in other omissions. *See* note 9 *supra*. We observe finally that appellant and counsel here, as in the *Fries* case, had hearsay reports but no direct proof of the juror misconduct prior to the verdict. *Cf. Morris v. United States*, 26 F.2d 444, 449 (8th Cir. 1928) (motion for disqualification of judge held timely although defendant had known of possible grounds for "a considerable time" previous to the motion).

Double Jeopardy

Appellant next argues that his conviction on both RICO counts would amount to double jeopardy, because both counts allege the same offense, participation in the same enterprise (the county judge's office) through the same "pattern of racketeering activity," *i.e.*, a bribery and

kickback pattern.[14] The double jeopardy clause would of course prohibit double punishment for the same offense, but we are of the view that the two counts do not allege the same offense under RICO. We therefore remand both RICO counts, as well as the Travel Act counts, for retrial.

As the Supreme Court has explained,

> It is Congress . . . which establishes and defines offenses. Few, if any, limitations are imposed by the Double Jeopardy Clause on the legislative power to define offenses. *Brown v. Ohio,* 432 U.S. 161, 165 (1977). But . . . Congress has defined a statutory offense by its prescription of the "allowable unit of prosecution," *United States v. Universal C.I.T. Credit Corp.,* 344 U.S. 218, 221 (1952); *Bell v. United States,* 349 U.S. 81 (1955); *Braverman v. United States,* 317 U.S. 49 (1942); *In re Nielsen,* 131 U.S. 176 (1889). . . . Whether a particular course of conduct involves one or more distinct "offenses" under the statute depends on this congressional choice.

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[14]Appellant also urges that his conviction both for Travel Act violations and also for a violation of RICO based on the Travel Act violations as racketeering activity would violate double jeopardy under the principle of **Blockburger v. United States,** 284 U.S. 299 (1932). We reject this contention. Each statutory offense includes an element not required to prove the other offense, **i.e.,** the defendant's participation in an enterprise under RICO and use of a facility in interstate commerce under the Travel Act. **Cf. United States v. Boylan,** 620 F.2d 359 (2d Cir.), **cert. denied,** 101 S.Ct. 103 (1980) (no double jeopardy in convictions arising out of same transactions for violations of both RICO and the criminal provisions of the Labor Management Relations Act, 29 U.S.C. §186(b)(1)); **United States v. Rone,** 598 F.2d 564 (9th Cir. 1979) (convictions under both RICO and 18 U.S.C. §894), **cert. denied,** 445 U.S. 946 (1980); **United States v. Prince,** 529 F.2d 1108 (6th Cir.), **cert. denied,** 429 U.S. 838 (1976) (convictions under both the Travel Act and the Mann Act, 18 U.S.C. §2421).

Sanabria v. United States, 437 U.S. 54, 69-70 (1978) (footnote omitted). *See generally* Westen & Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81, 113-19; Note, *Twice in Jeopardy*, 75 YALE L.J. 262, 311-13 (1965).

The language of RICO itself, however, does not reveal what Congress envisioned as the allowable unit of prosecution. The statutory words would support at least four interpretations of the allowable unit of prosecution under RICO. The statute proscribes conducting or participating in enterprises affecting commerce through a pattern of racketeering activity. 18 U.S.C. §1962(c). A pattern of racketeering activity is in turn defined as two or more of certain specified criminal acts. 18 U.S.C. §1961(5). By focussing on various aspects of the statute, one could consider the minimum allowable unit of prosecution as (1) the corruption of a particular enterprise (i.e., one enterprise, one RICO count); (2) each part of the corrupt activity which has an independent nexus to interstate or foreign commerce (i.e., one injury to commerce, one RICO count); (3) each pattern of racketeering activity which amounts to a distinguishable instance of conduct or participation in the affairs of an enterprise (i.e., one pattern, one RICO count); or (4) each pattern of racketeering activity, defined as any two or more racketeering acts (i.e., one RICO count for every two racketeering acts).

Appellant expresses the concern that, if we do not recognize the participation in a given enterprise as the allowable unit of prosecution, we of necessity would permit a RICO count for every two racketeering acts. We do not reach that issue because the prosecution has charged only two counts of RICO, one arising out of appellant's transac-

tions with Baldwin and the other out of transactions with Pratt. The various possible readings of the statutory words, however, do provide a background for the statutory interpretation problem we address in determining whether the two charges in this case involved different units of prosecution under RICO. But the words of the statute itself are ambiguous and provide no firm basis for choosing between interpretations holding the statutory unit of prosecution to depend upon the number of enterprises corrupted or upon the number of distinct patterns of corruption.

We turn to the legislative history for resolution of the ambiguity, keeping in mind that, "when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication." *United States v. Universal C.I.T. Credit Corp., supra,* 344 U.S. at 221-22. "[A]mbiguity should be resolved in favor of lenity." *Bell v. United States, supra,* 349 U.S. at 83. The ambiguity can be resolved in favor of the interpretation allowing a greater number of prosecutory units only where the legislative history evinces an intent clearly supportive of the harsher alternative. *See Ladner v. United States,* 358 U.S. 169 (1958).

The legislative intent concerning the allowable unit of prosecution may of course appear in the form of legislative history specifically setting forth the Congressional expectation of the allowable unit of prosecution. But the inquiry also requires consideration of the legislative history as a whole, because the allowable unit of prosecution is

integrally related to the questions of what evil Congress sought to address and how the statutory scheme combats the evil. For example, absent any legislative history under the federal narcotics acts specifically explaining whether given conduct would support single or multiple prosecutions, the Supreme Court found an intent to allow multiple prosecutions, where the statutory scheme involved "a network of provisions, steadily tightened and enlarged, for grappling with a powerful, subtle and elusive enemy." *Gore v. United States,* 357 U.S. 386, 390 (1958). That is, where Congress enacted multiple provisions that would penalize different aspects of the same course of conduct, it could be inferred that Congress meant to allow multiple punishments for a single course of conduct.

Giving full weight to the rule of lenity, we still perceive an unmistakable Congressional purpose to allow a separate unit of RICO prosecution for each distinct pattern of racketeering activity. Supporters of the RICO legislation, explaining its operation during the Congressional debate, shared the view that the evil to be punished was the pattern of racketeering activities and its injection into legitimate enterprises, not the conversion of legitimate enterprises into corrupt ones.[15] "[T]he provisions of [RICO] operate largely against patterns of racketeering activity." 116 Cong. Rec. 35295 (1970) (remarks of Rep. Poff). "[RICO] makes it a crime to use organized crime . . .

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[15]Although statements on the floor by legislators are not always the most persuasive indicia of legislative intent, the statements we rely on in this case are not isolated comment by individual legislators but rather indications of agreement among the sponsors and supporters of the legislation as to its central purpose. **Cf. American Sm. & Ref. Co. v. OSAHRC,** 501 F.2d 504, 509-10 (8th Cir. 1974) (comment by individual legislator not controlling).

methods to . . . operate any legitimate business." *Id.* at 35304 (remarks of Rep. Railsback). The crime is "to operate . . . a business [engaged in interstate commerce] by racketeering activities . . . ," *id.* at 36294 (remarks of Sen. McClellan), or "activities of criminals and their influence in supposedly legitimate businesses," *id.* at 953 (remarks of Sen. Thurmond).[16] The criminal penalties of the statute are aimed therefore not at those who are members of corrupted organizations but at those using the pattern of racketeering activity to operate the business. 18 U.S.C. §1962(c). Likewise, the criminal forfeiture section of the statute may deprive the person who has engaged in the racketeering activity of his interest in the enterprise, 18 U.S.C. §1963 (a)[17] but the section does not directly refer to any forfeiture by the corrupted enterprise.[18]

Finally, the statutory scheme is one that multiplies punishments for the proscribed conduct. The RICO punishment is predicated on the operation of an enterprise

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[16]Some legislators also did express support for the legislation as an attack on corruption of legitimate businesses and public officials. See 116 Cong. Rec. 601 (1970) (remarks of Sen. Hruska); id. at 603 (remarks of Sen. Yarborough); id. at 962 (remarks of Sen. Murphy). Although these statements show that one goal of the act was to free enterprises from the taint of racketeering activity, the legislators cited in the text who explained how RICO would attain that end all focussed on the penalization of the pattern of racketeering activity used to corrupt an enterprise.

[17]18 U.S.C. §1963(a) provides for anyone committing unlawful racketeering activities under RICO to "forfeit to the United States (1) any interest he has acquired or maintained in violation of (RICO), and (2) any interest in . . . any enterprises which he has . . . participated in the conduct of, in violation of (RICO)."

[18]Sen. McClellan did remark, "In some cases the organization will no doubt be so corrupt that it will have to be dissolved." 116 Cong. Rec. 592 (1970).

through racketeering activity defined to include only conduct that is otherwise punishable as a state or federal crime. Justice Frankfurter's analysis in *Gore* is fully applicable to RICO: "If the legislation reveals anything, it reveals the determination of Congress to turn the screw of the criminal machinery . . . tighter and tighter." 357 U.S. at 390. It would not be consistent with this basic purpose to read too readily into the act limitations preventing punishment for each instance of the evil Congress sought to address. That evil was the use of a pattern of racketeering activity as a means of operating an enterprise. We conclude that RICO includes a separate unit of prosecution for each distinct pattern of racketeering activity.[19]

The question remains whether the two RICO counts in this case charged two distinct patterns of racketeering activity. The critical statutory word — pattern — "is relatively new to the legislative criminal lexicon," *United States v. Stofsky*, 409 F. Supp. 609, 613 (S.D. N.Y. 1973), *aff'd*, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976). Courts and commentators have wrestled with the difficulties in defining the requisite "pattern" of activity

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[19]Our conclusion is consistent also with the holding of **United States v. Anderson**, 626 F.2d 1358 (8th Cir. 1980), **cert. denied**, 49 U.S.L.W. 3617 (1981). In **Anderson** we concluded that, because an enterprise is an essential element of a RICO violation under 18 U.S.C. §1962(c) separate from the pattern of racketeering activity, the enterprise must embody a lawful or unlawful "discrete economic association existing separately from the racketeering activity." **Id.** at 1372. Although an enterprise is an essential element of a RICO violation under §1962(c), however, that does not mean only one violation can be found for each enterprise. Rather, because the pattern of racketeering activity is under **Anderson** necessarily a separate element of each offense, each distinct pattern of activity will support a separate charge under §1962(c) regardless of the identity of the enterprise involved.

under RICO,[20] but not with the question of what conduct is divisible into more than one distinct pattern of racketeering activity.

The closest analogue we have found to the problem before us is the question of whether certain conduct comprises one or more criminal conspiracies. *See Arnold v. United States*, 336 F.2d 347 (9th Cir. 1964), *cert. denied*, 380 U.S. 982 (1965); *Short v. United States*, 91 F.2d 614 (4th Cir. 1937). A RICO charge focusses upon the "pattern" formed by a number of unlawful acts, while a conspiracy charge focusses upon the agreement formed by persons to do unlawful acts. Thus, a RICO charge, like a conspiracy charge, focusses upon a relation between various elements of criminal activity rather than a single criminal act. Determination in a given case of the number of patterns or agreements requires examination of the four corners of the charges. The cases have employed five factors to make this determination in conspiracy cases, and similar factors appear to us relevant in the RICO context: (1) the time of the various activities charged as parts of separate patterns; (2) the identity of the persons involved in the activities under each charge; (3) the statutory offenses charged as racketeering activities in each charge; (4) the nature and scope of the activity the government seeks to punish under each charge; and (5) the places where the

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[20]**See United States v. Weisman**, 624 F.2d 1118 (2d Cir.), **cert. denied**, 101 S.Ct. 209 (1980); **United States v. Aleman**, 609 F.2d 298 (7th Cir. 1979), **cert. denied**, 445 U.S. 946 (1980); **United States v. Weatherspoon**, 581 F.2d 595 (7th Cir. 1978); **United States v. Frumento**, 409 F. Supp. 136 (E.D. Pa. 1976), **aff'd**, 563 F.2d 1083 (3d Cir. 1977), **cert. denied**, 434 U.S. 1072 (1978); **United States v. Stofsky, supra**, 409 F. Supp. 609. **See generally** Bradley, **Racketeers, Congress, and the Courts: An Analysis of RICO**, 65 IOWA L. REV. 837, 861 (1980); Note, 33 VAND. L. REV. 441, 450 (1980).

corrupt activity took place under each charge. *Cf. Arnold v. United States, supra,* 336 F.2d at 350 (factors in conspiracy cases).

Applying these factors in this case we find that the two RICO counts involved distinct patterns of racketeering activity. The two counts involved activity taking place during different time periods. Under one count, unlawful acts allegedly occurred between January, 1974, and May, 1977; under the other count, between October, 1977, and July, 1978. Different persons were involved in the racketeering activity alleged under the two counts. One count is based on alleged transactions between appellant and Baldwin; the other is based on transactions between appellant and Pratt.

The nature and scope of the activity was somewhat different under each count. The purchases from Baldwin of "corrugated metal culverts and other items" allegedly involved a scheme whereby appellant would receive kickbacks on invoices for material delivered to the county by Baldwin and also on "bogus invoices" for material never delivered to the county. The purchases from Pratt also involved alleged kickbacks for materials delivered to the county, but no submission of "bogus invoices" for the materials, "diesel fuel additives, gasoline additives, motor oil, hydraulic and cleaning compounds, degreaser and other such products" — different types of materials than were allegedly involved in the Baldwin transactions. Finally, the corrupt activity involved transactions between the county and vendors in different geographical locations. The Baldwin transactions involved alleged county purchases from a vendor located in Georgia or Tennessee; the

Pratt transactions involved purchases from a vendor located in Texas.

On the other hand, there is an undeniable similarity between the patterns of activities under the two RICO counts: all the activities allegedly involved the same crime of bribery under the Arkansas statutes[21] and the federal Travel Act.[22] But this similarity alone does not mean that all the acts charged were part of a single pattern. Although both patterns were made up of the same kind of criminal activity, each pattern involved a different time period, a different vendor in a different geographic location, different materials which would not necessarily affect the same parts of the county's operations. All in all, the charges involve two distinct patterns of bribery rather than one.

We therefore conclude that charging appellant with two counts of RICO in the circumstances of this case would not violate the double jeopardy clause of the Fifth Amendment. We are mindful of the Supreme Court's admonition that, "The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal and spatial units." *Brown v. Ohio, supra*, 432 U.S. at 169. But the Supreme Court has never held that principle to preclude multiple charges for each distinct offense made criminal by the legislature, and this court has rejected a rule that would bar multiple prosecutions for distinct offenses simply because of their proximity of similarity. *See, e.g., Moton v. Swenson*, 488 F.2d 1060 (8th Cir. 1973), *cert. denied*, 417 U.S. 957 (1974); *United States v. Bandy*, 421 F.2d 646 (8th Cir. 1970).

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[21]**See note 3 supra.**

[22]**See note 4 supra.**

Admissibility of Income Tax Returns

Appellant also contends that the district court erred in admitting into evidence the tax returns of a business conducted by appellant, Frank Dean Farms, Inc. Appellant testified about his farming business on direct examination. The trial court admitted the first page of the business tax returns for the years 1974 through 1978 inclusive[23] as relevant in impeaching appellant's testimony which tended to give the impression of successful farming activities, and also as relevant in tending to show financial losses of appellants business as a possible motive for appellant's alleged acceptance of bribes. Appellant argues that the profit and loss figures from the business tax return do not reflect the actual financial status of the farming business.

We have little doubt that evidence of financial losses in appellant's business would have probative value in establishing a motive for the alleged bribery. *Cf. United States v. King*, 560 F.2d 122 (2d Cir), *cert. denied*, 434 U.S. 925 (1977) (business losses admitted in securities fraud case); *United States v. Houlihan*, 332 F.2d 8 (2d Cir.) (mail and wire fraud and interstate transportation of stolen securities), *cert. denied*, 379 U.S. 828 (1964). But we think the government must also show some reasonable basis for inferring actual financial losses from the figures shown on the business' tax return. The income tax return summarizes appellant's financial condition over a one-year period of time which may give an arbitrarily limited picture of the

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[23]The returns were admitted to show that the business showed under tax accounting principles a loss of $144,330 in tax year 1974, a profit of $71,786 in 1975, a profit of $32,740 in 1976, a loss of $123,474 in 1977, and a profit of $209,672 in 1978. The evidence also indicated that Dean was paid wages from the business of $18,000 in tax year 1974, $36,000 in 1975, $24,000 in 1976, 0 in 1977, and $24,000 in 1978.

financial health of a business. (For example, in this case a corporate loss of $123,474 in 1977 was followed by a profit of $209,672 in 1978.)[24] The ability to withstand repeated losses may be a sign of financial strength rather than weakness. Finally, of course, the internal revenue laws may impose accounting rules very different than those normally used to determine the financial health of a corporation. All these factors tend to attenuate the connection between the business tax return and the financial status of appellant. Nevertheless, admission of the tax returns in this case may compel appellant, who is accused of crimes involving submission of false invoices, to put on evidence that he submitted a tax return that did not reflect his actual financial condition. The potential for confusing the jury on matters very prejudicial to appellant is apparent. Moreover, the record indicates that in this case the government could have established without using the tax returns the financial condition of appellant's business, for example, through the corporation's bank records or books.

The cases have recognized the potential for abuse in admission of income tax returns.[25] In *United States v. Williams*, 613 F.2d 560 (5th Cir. 1980), a drug prosecution, the defendant offered his income tax return as evidence he

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[24]Also in 1974, appellant drew a salary from the business even though it showed a loss. **See** note 23 **supra.**

[25]A similar question has arisen in regard to the admissibility of income tax returns to show business losses in cases where an insurer defends against a fire loss claim on the basis that the insured set the fire and was motivated by the losses. In such circumstances appellate courts have upheld the trial court's exercise of discretion in excluding or admitting such evidence. **Compare State Farm Fire & Cas. Co. v. McFerrin,** 382 F.2d 282 (5th Cir. 1967), **cert. denied,** 390 U.S. 953 (1968) (tax returns not admitted), **with Esquire Restaurant, Inc. v. Commonwealth Ins. Co.,** 393 F.2d 111 (7th Cir. 1968) (tax returns admitted), **and McIntosh v. Eagle Fire Co.,** 325 F.2d 99 (8th Cir. 1963) (tax returns admitted).

had derived his income from an upholstery business, not from the sale of controlled substances as alleged by the government. The Fifth Circuit affirmed the district court's refusal to admit the evidence, and commented, "whatever probative value lay in the tax returns was miniscule and the potential for mischief was substantial." *Id.* at 563. In *Courtney v. United States,* 390 F.2d 521 (9th Cir.), *cert. denied,* 393 U.S. 857 (1968), the defendant, accused of coercing women into prostitution and taking their earnings, denied that he had received any money from them and claimed instead to have made his living as an entertainer. The government introduced for impeachment purposes evidence that the defendant had failed to file an income tax return during the relevant time period. The Ninth Circuit held that the district court had abused its discretion in admitting the evidence, because "[a] jury should not be permitted to speculate that appellant received income from sordid sources because of his failure to file an income tax return, especially where it is conceded that he received income from non-sordid sources upon which he paid no tax and filed no income tax return." *Id.* at 530. Likewise in this case the connection is weak between the losses shown on the tax return and the actual financial state of appellant's business, at least absent some additional showing that the tax return is an accurate reflection of the business' actual financial condition.

In the circumstances of this case we have deep reservations about the admissibility of appellant's income tax returns. The admissibility of evidence, however, is a matter within the district court's discretion, *United States v. Johnson,* 605 F.2d 1088 (8th Cir. 1979) (per curiam); *United States v. Green,* 600 F.2d 154 (8th Cir. 1979) (per curiam);

United States v. Adcock, 558 F.2d 397 (8th Cir.), *cert. denied*, 434 U.S. 921 (1977). We do not know whether the government will attempt to use the tax returns as evidence on remand or what circumstances may arise bearing on their admissibility. We therefore pretermit any conclusion on the question pending further proceedings in this case.[26]

Other Issues

Appellant makes a number of other contentions which require only brief consideration. Appellant contends for the first time on appeal that the indictment failed to charge that appellant conducted or participated in an "enterprise" through a pattern of unlawful activity under RICO, because the "enterprise" charged in the indictment — "the office of County Judge of Poinsett County, Arkansas" — is nothing more than "an unfilled state elective office." Brief of Appellant at 8. Appellant contends that, "[b]ecause no proof was offered at trial as to exactly how 'the office of County Judge of Poinsett County' became an 'enterprise,' it is a little difficult to accurately set forth the government's contention." *Id.* We regard this argument as specious in view of the fact that in the district court all parties interpreted the word "office" to mean a division or department of the county government, not "an unfilled elective position." Appellant testified:

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[26]Appellant also claims the government's evidence of gambling trips by him should have been excluded on grounds that its prejudiciality outweighed its probative value. The district court admitted evidence of one gambling trip but ruled evidence of a second trip to be cumulative and unduly prejudicial. We doubt the district court abused its discretion. **See United States v. Kwitek**, 467 F.2d 1222 (7th Cir.), **cert. denied**, 409 U.S. 1079 (1972). Other points raised by appellant raise issues that may not arise in a new trial and we see no value in any discussion at this time.

Q. [by Mr. Pickens, appellant's attorney] At the time you went out of office, how much staff did you have as county judge?

A. [by appellant] In the office proper?

Q. Office proper.

A. Three secretaries.

Appellant himself regarded his office not merely as his elective position but as an operating entity within the county government which included at least three other persons.[27] Thus, the indictment charged and the jury could have found[28] that the office was an enterprise, which is defined under the RICO statute as "including any . . . association or other legal entity, and any . . . group of individuals associated in fact although not a legal entity." 18 U.S.C. §1961(4).[29]

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[27]Appellant testified also

> . . . in 1967, our government wasn't nearly as large as it is now. And I tried to run it as a business . . .
>
> But after three or four years in office, the Government got bigger. . . .
>
> And then I had to change my operation. . . . I tried to run it like an industry, where I had department heads and different foremen and different people for different jobs.

[28]The district court left it to the jury to find whether the office of county judge was in fact an "enterprise" under the statutory definition. Appellant requested no instruction defining the word "enterprise" further.

[29]Appellant does not argue on appeal that a governmental entity cannot be an enterprise under RICO. It was his position that, because the words "office of county judge" could not describe an enterprise under RICO for reasons addressed in the text, this court does not need to decide in this case whether a governmental entity could be a public enterprise. We note that the issue is presently pending before this court in **United States v. Clark**, No. 80-1978 (8th Cir., filed Apr. 17, 1981).

Appellant also contends that the district court erred in instructing the jury that "the term pattern or racketeering activity *means* at least two acts of racketeering activity." (Emphasis added) The statutory definitions state that a "pattern of racketeering activity *requires* at least two acts of racketeering activity. . . ." 18 U.S.C. §1961(5) (emphasis added). In appellant's view, by changing the word "requires" in the statute to the word "means" in the instruction, the district court removed from the jury's consideration the essential element factual element of "a *pattern* of racketeering activity" under the RICO offense. 18 U.S.C. §1962(c) (emphasis added). The argument is that Congress did not fully define "pattern of racketeering activity" in §1951(5), but rather provided only a partial contextual definition[30] by placing the words from §1962 in another context which would demonstrate one aspect of their meaning. Section 1961(5) does not say what the "pattern of racketeering activity" is, only what it "requires." Arguably, Congress did not thereby obviate under RICO the explicit definition[31] of the word "pattern," including the connotation of "continuity plus relationship," S. REP. NO.

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[30]A contextual definition is "a definition in which the meaning of a word . . . is partly or wholly determined by defining the meaning of a larger expression containing the (word to be defined) (as a definition of a legal right by the statement 'X had a **legal right** to Y equals X has a claim upon somebody for possession of Y which the courts will sustain.')." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 492 (1966).

[31]An explicit definition is "a definition giving an exact equivalent for the term defined." **Id.** at 801.

617, 91st Cong., 2d Sess. 158 (1969).[32] Appellant, however, failed to object to the instructions at the time they were given by challenging either the wording of the instruction given or the failure to give an instruction setting forth the explicit definition of the word "pattern." We therefore do not address appellant's contention at this time.

For the reasons stated above, the judgment of the district court is reversed and the case is remanded to the district court for a new trial.

BRIGHT, Circuit Judge, dissenting.

I dissent from the grant of a new trial to the defendant. The record in this case unequivocally demonstrates that both defendant and his lawyer learned of the juror's misconduct before the jury retired to consider the evidence, but elected to gamble on the return of a favorable verdict by remaining silent. Under these circumstances, defendant cannot now be heard to complain that the juror's misconduct prejudicially influenced the jury's verdict. In accordance with the long-established decisions of this court, therefore, the district court did not abuse its discretion in vacating its order granting defendant's motion for a new trial.

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[32]Authorities collected in note 20 **supra** divide on the issue. The Senate report stated:

> The concept of "pattern" is essential to the operation of the statute. . . . The target of (RICO) is . . . not sporadic activity. The infiltration of legitimate business normally requires more than one "racketeering activity" and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combines to produce a pattern.

S. REP. NO. 617, at 158.

The district court initially granted defendant's motion for a new trial because one juror's preverdict statements evidenced "a settled disposition on the part of the juror to convict the defendant regardless of the evidence." *United States v. Dean*, Nos. J-CR-79-1 and J-CR-79-10, slip op. at 6 (E.D. Ark. Sept. 26, 1979). Upon the Government's motion for reconsideration, however, the district court vacated its order for a new trial and reinstated the guilty verdict. After a thorough evidentiary hearing, the court found that both defendant and defense counsel knew of the alleged juror bias before the close of trial, that neither brought this information to the court's attention or sought any preverdict relief to insure a fair trial before the jury convicted defendant, that defense counsel unjustifiably delayed in apprising the court of the juror misconduct, and that the court could have substituted an alternate juror for the biased juror had it been informed of the juror's prejudice. *United States v. Dean*, Nos. J-CR-79-1 and J-CR-79-10, slip op. at 4-5 (E.D. Ark. Oct. 11, 1979).

The majority does not dispute these findings. Nevertheless, it concludes that the "order for a new trial must be reinstated as an exercise of our supervisory power over the administration of justice in this circuit." Slip op. at 6. As justification for this conclusion, the majority stresses the existence of "actual, not potential, juror bias" in this case and the availability of some "appropriate forum" to remedy counsel's lack of diligence in raising the question of juror bias. Slip op. at 7. Neither ground, in my view, justifies a new trial for defendant.

The majority first distinguishes our previous decision denying a new trial for juror misconduct as cases "with a

potential for affecting impartiality, but not cases in which a juror was actually biased." Slip op. at 8. All of these decisions, however, focused on two factual matters: (1) the timeliness of objection once the defendant learned of alleged juror misconduct during the trial; and (2) the degree of prejudice that likely flowed to the defendant from the juror misconduct. Only after the defendant established the timeliness of his objection to the alleged misconduct did the degree of bias — actual or potential — become critical to the defendant's right to a new trial. *See United States v. Sorenson,* 611 F.2d 701, 702 (8th Cir. 1979) ("[O]bjections based on juror misconduct during the trial cannot be raised for the first time on appeal when counsel did not apprise the trial court of the alleged misconduct at trial."); *United States v. Nance,* 502 F.2d 615, 621 (8th Cir. 1974) ("A party may not stand idly by, watching the proceedings and allowing the court to commit error of which he subsequently complains."), *cert. denied,* 420 U.S. 926 (1975); *United States v. Hester,* 489 F.2d 48, 50 (8th Cir. 1973) ("Hester, failing to apprise the trial court of this alleged misconduct, should not be allowed to inject 'a defect into the trial, and later claim its benefit.' ").

The majority contends, however, that, "The way to address counsel's unjustified delay in raising the question of juror bias is to proceed against counsel in an appropriate forum." Slip op. at 7. This contention ignores the district court's explicit finding that *both* defendant and defense counsel knew of the allegations of juror misconduct before the jury retired to consider its verdict. The majority does not disturb this finding, nor does it expressly set aside the district court's finding that defendant received a fair trial under the totality of the circumstances.

For these reasons, I would sustain the district court's decision to vacate its order granting defendant's motion for a new trial.

Further, I express disagreement with the majority's disposition of defendant's contention that the office of county judge cannot be a "legal entity" and, therefore, the "enterprise" necessary to a RICO prosecution. The district court, with the majority's approval, left it to the jury as a factual matter to determine whether the office of county judge was an "enterprise" within the meaning of the RICO statute, 18 U.S.C. §1961(4) (1976).

In my view, however, the definition of a statutory term presents a question of law, not a question of fact that may be resolved solely through a review of the evidence. Section 1961(4) defines "enterprise" as including "any individual, partnership, corporation, association, or other legal entity." Under this definition, the office of county judge would be an "enterprise" only if it is an "other legal entity." Defendant argues that the office of county judge cannot be a "legal entity" because it lacks legal capacity to sue or be sued. Further, he argues that the *ejusdem generis* rule of statutory interpretation would limit the meaning of "other legal entity" to identities similar in nature to the words preceding the phrase in the statutory definition. These words — individual, partnership, corporation, and association — differ significantly in their characteristics from a governmental office.

Moreover, Congress specifically defined "State" in the RICO statute to include "any political subdivision, or any department, agency or instrumentality thereof," 18 U.S.C. §1961(2), but made no mention of "State" or "any instrumentality thereof" in its definition of "enterprise."

Although I entertain considerable doubt as to the validity of the majority's disposition of defendant's conviction under the RICO counts, this issue comes to us only in the posture of a contention that the term "office" cannot be a "legal entity" under the statute. Defendant does not dispute in this case that a public body may constitute a legal entity. *See* slip op. at 24 n. 29. Because the scope of RICO presents an important issue not fully briefed or raised in this appeal and because defendant received a concurrent sentence on the Travel Act and RICO counts, I would leave the issue for another day in a more appropriate case.

Accordingly, I would affirm defendant's conviction without resolving the RICO question presented to us on this appeal. I also would sustain the district court's decision to vacate its order granting defendant's motion for a new trial.

A true copy.
ATTEST:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS JONESBORO DIVISION

UNITED STATES OF AMERICA ..... PLAINTIFF,

v. Nos. J-CR-79-1 & J-CR-79-10

FRANK DEAN ..... DEFENDANT.

ORDER

On May 20, 1980, the Court held a hearing, at which statements of counsel were received, on the motion of defendant for reconsideration of the Court's order of May 8, 1980, settling for purposes of the appeal an abbreviated transcript of the evidentiary hearing on the motion of the United States for reconsideration of the Court's order granting a new trial.

At the conclusion of the hearing, the Court made the following rulings from the bench, which are hereby embodied in this order.

1. Defendant asks that the account of the Court's findings be amended by adding a finding to the effect that defendant had not received a fair trial. This request is denied. The Court has no recollection of making such a statement in the course of delivering its oral opinion on the Government's motion for reconsideration, and is morally certain that it did not make such a statement. The Court does not find that the defendant did not receive a fair trial. Whether the trial was fair under all of the circumstances, including the knowledge that the defendant

and his counsel had during the trial with respect to the misconduct of the juror Reynolds, is a question of law to be decided on the appeal.

2. Defendant also requests that the Court amend its findings to reflect that the basis for its grant of the government's motion for reconsideration of the order granting a new trial was not waiver on the part of the defendant, but rather estoppel. The Court does recall discussing these legal concepts during its oral opinion. The defendant's motion, in this respect, is granted to the following extent. The findings of the Court are amended by adding thereto the following sentences: "The Government argues that the defendant waived his right to question the conduct of the juror Reynolds. The Court is not sure that the concept of waiver is the proper one for analyzing this situation. Probably what we have here is an estoppel."

The important question, in this Court's opinion, is not whether the label "waiver" or the label "estoppel" is attached to the trial conduct of defendant and his counsel, but rather whether, under all the circumstances, defendant is disabled from relying upon the misconduct of Mr. Reynolds. When the Court used the term "estoppel," it had in mind the following type of analysis. Defendant and his counsel were on notice that Mr. Reynolds had been making prejudicial statements. Counsel for defendant failed to bring this fact to the attention either of the Court or of opposing counsel. This silence was, in effect, a representation that the defendant had no objection to the continuing service of the juror Reynolds. The Court and the United States relied upon this representation. Had defendant or his counsel brought to the Court's attention the information they had been given about Mr. Reynolds, a hearing could

have been held, perhaps resulting in Mr. Reynolds's being excused, and replaced by one of the alternates, of whom two were available. In these circumstances, the Court thought, and still thinks, that it would be unfair and inequitable to grant a new trial. The legal label that should be attached to these circumstances, and whether in fact the Court has correcty assessed their legal effect, is of course a question to be determined on the appeal.

IT IS SO ORDERED this 30th day of May, 1980.

/s/ Richard S. Arnold,
United States Circuit Judge,
sitting by designation.

APPENDIX "D"

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS JONESBORO DIVISION

UNITED STATES OF AMERICA ..... PLAINTIFF,

v. Nos. J-CR-79-1 & J-CR-79-10

FRANK DEAN ..... DEFENDANT.

ORDER

This cause came on for hearing in Jonesboro, Arkansas, on Wednesday, October 10, 1979, on the Government's motion for reconsideration of the Court's Order granting the defendant a new trial.

After hearing testimony of witnesses for both parties, and in accordance with the Court's Finding of Facts and Conclusions of Law delivered in open court, the Government's motion is granted, and IT IS HEREBY ORDERED:

That the Opinion and Order filed on September 26, 1979, granting the defendant's motion for a new trial, is hereby vacated, and the jury verdict of July 20, 1979 is hereby reinstated.

Sentence will be imposed on Wednesday, October 17, 1979, at 1:30 p.m. in Little Rock, Arkansas.

DATED this 10th day of October, 1979.

/s/ Richard S. Arnold,
United States District Judge

APPENDIX "E"

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS JONESBORO DIVISION

UNITED STATES OF AMERICA ..... PLAINTIFF,

v. Nos. J-CR-79-1 & J-CR-79-10

FRANK DEAN ..... DEFENDANT.

OPINION AND ORDER

On September 20, 1979, an evidentiary hearing was held on defendant's motion for a new trial. Both the defendant and the United States presented testimony. At the conclusion of the hearing, the Court took the motion under advisement and directed that a transcript be prepared of the testimony. The transcript has been prepared, and the Court has examined it. The Clerk will file the transcript.

There was testimony about a number of statements that Lawrence Reynolds, one of the members of the jury, made during the trial. Lloyd Bishop testified, for example, that on July 9, 1979, the first day of the trial, after court had recessed for the day, Mr. Reynolds told him: "Well, I don't know whether he's guilty or not, but he's not going to get out" (Tr. 20). Mr. Reynolds also said on another occasion: "Well, if the man would offer me a $2,500.00 bribe I'd just lock the jury up" (Tr. 24). According to Mr. Bishop, Mr. Reynolds also said that "He would be glad when it was over because he'd already established the fact that he was guilty" (Tr. 24).

Benjamin (Jack) Hall corroborated Mr. Bishop's testimony. According to Mr. Hall, Mr. Reynolds said that "they was going to set an example out of Mr. Dean, you know, then they was going to get a few more after they had got him" (Tr. 32-33).

In addition, Mr. Hall testified about a statement made by Mr. Reynolds on the night of Monday, July 16, 1979, the first day of the second week of the trial. According to Mr. Hall, Mr. Reynolds said on this occasion that "they was going to hang Frank Dean and then they was going to get a bunch more of them while they was at it" (Tr. 34).

The testimony of Joyce Taylor was in substantial agreement with that of Mr. Hall with respect to statements made on July 16. Ms. Taylor testified that Mr. Reynolds said that "they were going to hang him and make an example of him and then that they were going to get several others" (Tr. 43).

Mr. Reynolds himself testified that he did nct remember all that had been said, but that the conversations to which Mr. Bishop, Mr. Hall, and Ms. Taylor testified did take place. Mr. Reynolds also testified that he decided the case "on the last day when we was told to go to the jury room and decide it" (Tr. 56).

The Court finds that Mr. Reynolds in fact made the statements attributed to him by Mr. Bishop, Mr. Hall, and Ms. Taylor. These statements were misconduct on the part of the juror. They were in violation of two explicit instructions repeatedly given by the Court during the course of the trial: First, that jurors not discuss the case with anyone until it was finally submitted to them for deliberation; and

second, that jurors keep an open mind until all the evidence had been heard.

It is not every case of misconduct, of course, that requires the granting of a motion for a new trial. The trial of this case lasted two weeks. It was costly to both sides in time and money, and jury verdicts should not be lightly set aside. The defendant has the burden of establishing by a preponderance of the evidence that he is entitled to a new trial. After taking all of these rules into account, and after carefully weighing the expense and inconvenience that a new trial would entail, this Court holds that the motion must nevertheless be granted. A defendant is entitled to a fair and unbiased jury, and that means 12 fair and unbiased persons, not 11. If Mr. Reynolds had simply stated that he thought the defendant was guilty, a new trial would not have to be granted, because such a statement would not necessarily indicate a disposition on the juror's part to convict the defendant regardless of what evidence might be presented at the trial in the future. The statements made by the juror in this case go beyond a simple expression of opinion. They evidence a settled disposition on the part of the juror to convict the defendant regardless of the evidence. The juror's perfunctory testimony that he did not make up his mind until the last day is insufficient to overcome the clear showing of bias. Bias of this kind in any trier of fact, judge or jury, is inconsistent with the constitutional guarantee of a fair trial. "Clear . . . bias of a juror is . . . ground for new trial. . . ." 6A MOORE, FEDERAL PRACTICE 59-124 (2d ed. 1979).

Fed. R. Evid. 606(b) does not make inadmissible the testimony recited above as to Mr. Reynolds's statements during the course of the trial. What is at issue here is not

the juror's "mental process" but rather an overt and public statement by him of bias.

The motion for new trial is granted, and the verdict of the jury is set aside. Counsel are directed to appear before the Court at 9:00 a.m. on Wednesday, October 3, 1979, in Jonesboro. At that time a new trial date will be set. Counsel should also be prepared to discuss whether the trial should be held at Jonesboro or at Little Rock.

IT IS SO ORDERED this 26th day of September, 1979.

/s/ Richard S. Arnold,
United States District Judge.

Opposition

Office - Supreme Court, U.S.
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No. 81-1644

In the Supreme Court of the United States

OCTOBER TERM, 1981

FRANK DEAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the bias of a juror mandates that he receive a new trial even though both he and his attorney could have avoided any prejudice by bringing the juror's bias to the attention of the court before the conclusion of trial.

After a jury trial in the United States District Court for the Eastern District of Arkansas, petitioner was convicted on two counts of racketeering, in violation of 18 U.S.C. 1962(c), and 36 Travel Act counts, in violation of 18 U.S.C. 1952. Petitioner was sentenced to three years' imprisonment, to be followed by three years' probation, and was ordered to make restitution totalling $80,000. Petitioner's conviction was affirmed by the court of appeals sitting en banc (Pet. App. A3-A13), following an initial reversal of his conviction by a divided panel of the court (*id.* at A14-A44).

1. The evidence at trial, which is not in dispute, established that petitioner accepted bribes and kickbacks from

various salesmen during the 12 years he served as purchasing agent for Poinsett County, Arkansas.[1] On occasion petitioner also approved for payment out of county funds certain bogus invoices that had been submitted to his office, with the proceeds split between petitioner and the salesmen submitting the invoices.

Following the conclusion of trial and the return of the verdict, petitioner moved for a new trial. Evidence presented at a hearing on the new trial motion showed that one of the jurors had made statements during the trial to the effect that the defendant was guilty and should be convicted. The district court initially granted petitioner's motion (Pet. App. A49-A52), finding "a settled disposition on the part of the juror to convict" petitioner (*id.* at A51).

Subsequent investigation by the government, however, revealed that defense counsel had received an anonymous note during trial informing counsel of the juror's bias. The note stated (Pet. App. A6):

> There is a rumor that one of the Jurors told a Mr. Johnson, at Johnson's Cafe, on 49 Highway, that [petitioner] was 'hung.' This statement was made last week. The person that made this statement works at Dixon's Garage and is serving on the jury.

Defense counsel discussed the note with petitioner but did not notify the prosecutor or the court of either the note or its contents (*id.* at A6-A7). Defense counsel and petitioner also did not inform the court of the note during the hearing on the motion for a new trial.

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[1] Petitioner's official title was "County Judge." The position, however, was not a judicial office, but rather was equivalent to that of a county supervisor.

Following discovery of the note, the government moved for reconsideration of the new trial order in light of petitioner's prior knowledge of the juror's alleged bias. After a hearing, the district court found that counsel, " 'in the exercise of reasonable diligence, should have brought the allegation of misconduct on the part of this juror to the [c]ourt's attention' " (Pet. App. A19).[2] The district court construed petitioner's failure to bring the juror's bias to its attention as a waiver and therefore granted the government's motion for reconsideration, vacating its earlier new trial order.

2. On appeal, a panel of the court of appeals reversed. It held that actual juror bias required a new trial, notwithstanding petitioner's prior knowledge of and ability to cure the defect (Pet. App. A14-A40). Judge Bright dissented, concluding that petitioner and his counsel "elected to gamble on the return of a favorable verdict by remaining silent" (*id.* at A40, A41-A44). The court of appeals sitting en banc reversed the panel and affirmed the district court (*id.* at A3-A13). The en banc court did not dispute the panel's finding of actual bias, but focused on petitioner's personal knowledge of the bias and held that, despite the establishment of prejudice, "by not bringing the question of juror misconduct to the attention of the trial court before the verdict was returned, [petitioner] * * * waived his right to a new trial" (*id.* at A13).

3. There is no need for further review of the unique factual circumstances of this case, and the decision presents no conflict with any other decision.[3] The law is well-settled

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[2]Indeed, at one point during the trial the court specifically requested that it be alerted if either side learned of any juror complaint, and by implication anything that would call into question the impartiality of a juror (Tr. 379E-379H).

[3]The panel opinion vacated by the en banc court below relied on *United States* v. *Rattenni*, 480 F. 2d 195 (2d Cir. 1973), and *United States* v. *Fries*, 9 F. Cas. 826 (C.C.D. Pa. 1799) (No. 5126). Neither

that a defendant may not exploit on appeal a trial error, including jury misconduct, that he could have avoided but chose not to for tactical reasons. See, *e.g., United States* v. *Sorenson*, 611 F. 2d 701, 702 (8th Cir. 1979); *Oakes* v. *Howard*, 473 F. 2d 672, 674 (6th Cir.) cert. denied, 412 U.S. 952 (1973). Of course, error that cannot be cured even when promptly brought to the attention of the court is not subject to a waiver analysis. *E.g., United States* v. *Freeman*, 634 F. 2d 1267, 1269 (10th Cir. 1980); *Government of the Virgin Islands* v. *Romain*, 600 F. 2d 435, 437 (3d Cir. 1979). In this case, however, prompt notice to the court of the juror's expressed bias could have avoided any prejudice to petitioner while at the same time avoiding the necessity of a second trial. One of the three alternate jurors present during the trial could easily have been substituted for the biased juror, and no question of partiality thus would have arisen. Moreover, petitioner and his attorney alone knew of the expressed bias and were therefore the only parties in a position to inform the court. Under these facts both the district court and the en banc court of appeals were correct

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case, however, conflicts with the decision of the en banc court affirming petitioner's conviction.

In *Rattenni*, the evidence was uncontradicted that neither defense counsel nor the defendant himself knew of any juror misconduct necessitating a new trial until after the verdict had been returned. 480 F. 2d at 197. Because counsel could not cure misconduct of which he was unaware, the court rejected the argument that the judgment should "stand because of the alleged dereliction of Rattenni's counsel." *Ibid.* In *Fries*, although there is the ambiguous assertion that counsel for defendant "received a slight information" before verdict that he should have made "further inquiries into" (9 F. Cas. at 916), there is no evidence in the rambling record of that case that the defendant himself knew of any juror bias prior to verdict. Thus, neither *Rattenni* nor the very old and opaque district court decision in *Fries* stands for the proposition that a defendant's before-verdict knowledge of and failure to attempt to cure juror prejudice may not constitute a waiver of his right to an impartial jury.

in finding that petitioner made a deliberate decision to gamble on the verdict and seek a new trial in the event that his gamble failed.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

MAY 1982

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[4]Petitioner also presents as a separate question (Pet. ii) the issue whether vacating a new trial order and reinstating the jury verdict violated petitioner's Fifth and Sixth Amendment rights. As even petitioner notes, however, the issue has never been raised before. Accordingly, it may not be raised for the first time on certiorari. *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Lawn* v. *United States*, 355 U.S. 339, 362 n.16 (1958). Petitioner, moreover, does not argue the merits of the claim in the body of his petition.

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